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4 BEFORE THE INSURANCE COMMISSIONER
5 OF THE STATE OF WASHINGTON

6 In the Matter of the Application
7 regarding the Conversion and
8 Acquisition of Control of Premera Blue
9 Cross and its Affiliates.

No. G 02-45

TWENTY-EIGHTH ORDER: RULING
ON DISCLOSURE OF POST-
CONVERSION COMPENSATION
PLAN

10 The issue before me is whether information on Premera's plans for post-conversion
11 compensation for its directors, officers, and employees may be disclosed to the public in
12 response to a Public Disclosure Act request by the Seattle Times. The information at issue is
13 contained in a written presentation (the "Mercer report") made by Mercer Human Resource
14 Consulting to Premera's board of directors. The Mercer report was filed with the Office of
15 the Insurance Commissioner ("OIC") on October 17, 2003, when Premera filed its proposed,
16 detailed stock ownership plan. The report was submitted by Premera under seal. After the
17 request by the Seattle Times, Premera sought protection of the report by filing a motion with
18 the Special Master asking that certain information in the report remain redacted, including
19 current and post-conversion compensation plans.

20 Current compensation of officers and directors is required to be filed with the OIC in
21 public documents pursuant to RCW 48.43.045(2) and the instructions of the National
22 Association of Insurance Commissioners ("NAIC") for the filing of the Annual Statement. As
23 current compensation is public information, the Special Master required that it be disclosed in
24 the Mercer report. With respect to post-conversion compensation, Premera argued that the
25 information constitutes a trade secret and, therefore, is not disclosable. Neither the
26 Interveners nor the OIC Staff objected to Premera's request to keep post-conversion

1 compensation confidential. Consequently, the Special Master did not order the information to
2 be disclosed. However, I directed that the Special Master refer the issue to me for further
3 consideration. Premera was given an additional opportunity to brief the issue, and a hearing
4 was held where I heard oral argument. *See* RCW 48.31C.130 (health carrier is entitled to
5 notice and a hearing prior to disclosure of confidential proprietary trade secret information).

6 In general terms, the information that is the subject of discussion is the number of
7 shares of stock that officers, directors, and certain employees may receive as part of their post-
8 conversion annual and long term compensation. According to Premera, the number of shares
9 establishes a cap for a stock award but does not guarantee an award. The information includes
10 a projected value of the stock, so that one can add base salary and potential stock
11 compensation to reach the projected, potential value of total direct compensation. The
12 information is specific as to name and position for each of the officers. The information that
13 is the subject of this order is on pages 8, 9, 10, 13 and 14 of the Mercer report.

14 The first issue is whether Premera's post-conversion potential compensation plan is a
15 trade secret and, therefore, not disclosable under the Public Disclosure Act. *See* RCW
16 42.17.260(1); *see also* RCW 42.17.310(1)(h).¹ The second issue, regardless of whether post-
17 conversion potential compensation is a trade secret, is whether it is in the public interest to
18 disclose the information under the Holding Company Act, RCW 48.31C.130.

19 Premera argues that its post-conversion potential compensation plan is a trade secret,
20 because its competitors could take advantage of the information by designing more favorable
21 offers that could lure away existing management. This scenario is what Premera terms as
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23 ¹ Premera cites to the "research data exemption," RCW 42.17.310(1)(h), and the "other
24 statutes exemption," RCW 42.17.260(1), in its objection to disclosure. The "other statutes
25 exemption" encompasses the statutory exemption for trade secrets found in RCW 48.31C.130.
26 It is not at all clear how Premera's potential post-conversion compensation plans for its
management constitutes research data. Regardless, Premera relies on the same arguments to
support both contentions. As discussed in this order, I do not find that Premera's arguments
are supported by the facts in this case.

1 “poaching.” The burden is on Premera to prove this. *The Confederated Tribes of the*
2 *Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 749, 958 P.2d 260, 267 (1998).

3 Washington law defines a “trade secret” as,

4 Information, including a formula, pattern, compilation, program, device,
5 method, technique, or process that:

6 (a) Derives independent economic value, actual or potential, from not being
7 generally known to, and not being readily ascertainable by proper means by,
8 other persons who can obtain economic value from its disclosure or use; and

9 (b) Is the subject of efforts that are reasonable under the circumstances to
10 maintain its secrecy.

11 RCW 19.108.010(4). Factors to consider in determining whether certain information
12 constitutes a trade secret are whether (1) the information is novel, (2) the information may be
13 discerned from public sources, (3) steps are taken to protect the information consistent with the
14 party’s claims for the need for confidentiality, and (4) evidence is presented that the
15 information derives independent economic value from not being generally known. *See The*
16 *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 749-50, 958 P.2d
17 260, 267 (1998); *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn.App. 319, 324-29, 828 P.2d 73,
18 76-79, *review denied*, 120 Wn.2d 1007, 841 P.2d 47 (1992) (overruled on a different issue by
19 *Waterjet Technology, Inc. v. Flow Intern. Corp.*, 140 Wn.2d 313, 996 P.2d 598 (2000)).

20 Disclosure of compensation arrangements in this case must be placed in the context of
21 the highly regulated nature of the insurance business. As part of filing its Annual Statement,
22 an insurer is required to file a Supplemental Compensation Exhibit, which discloses all of the
23 compensation paid to officers, directors, and other highly compensated employees.
24 Compensation includes “any and all remuneration . . . including, but not limited to, wages,
25 salaries, bonuses, commissions, stock grants, gains from the exercise of stock options, and any
26 other emolument.” *NAIC Quarterly and Annual Statement Instructions, 2004*, Sup. Instr. 5-1.

1 In addition, the Washington legislature enacted a law, RCW 48.43.045(2), specifically
2 requiring health carriers to report annually “the amount of wages, expense reimbursements, or
3 other payments” made to officers, directors, and trustees. The information is reported and
4 disclosed as to each individual covered by the reporting requirement. The NAIC
5 Supplemental Compensation Exhibit and the annual statutory report are public documents and
6 are routinely disclosed. Specific compensation information is readily available to the public.
7 Any competitor can know what an insurance executive’s actual compensation has been over
8 time and design a more attractive employment package based on that information.

9 Premera argues, however, that potential future compensation should be treated
10 differently than actual paid compensation. According to Premera, competitors can gain an
11 advantage if they know what officers and directors of Premera might earn post-conversion.
12 However, potential future compensation is a much more speculative basis than actual
13 compensation history upon which a corporate “poacher” and a Premera “poachee” might rely
14 to strike an employment deal. The Premera executive’s future compensation is based on his
15 or her performance, the value of the stock, the financial condition of the company, board
16 approval, and other factors that may be out of the control of the executive. In addition, at oral
17 argument, counsel for Premera acknowledged that officers and directors are not prohibited by
18 the company from sharing the details of their compensation arrangements with others, even
19 from those they might be negotiating with for possible employment. Furthermore, the fact
20 that executive compensation may be made up in large part by stock grants is not an industry
21 secret. OIC Staff experts who reviewed the stock ownership plan discussed this fact. The
22 experts explained that it is expected, and even favorably viewed by the markets, that an
23 executive’s compensation is comprised largely of stock. In this way, the executive’s personal
24 financial interests are more closely aligned with the company’s financial interests. See
25 *Executive Compensation Report of Cantilo and Bennett, L.L.P.*, dated November 26, 2003, at
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1 15. Obviously, for the markets to react positively, the composition of management's
2 compensation must be known.

3 The burden of proof is on Premera to establish that information regarding the post-
4 conversion compensation is a trade secret. Premera's "poaching" justification for non-
5 disclosure, however, is not persuasive or supported. Premera does not buttress its concern
6 about poaching by offering any examples that have occurred in the past. Indeed, based on the
7 expert reports filed in this case, Premera's top management has been quite stable. *See*
8 *Executive Compensation Review of PriceWaterhouseCoopers*, dated October 2003, at 7-8.
9 Premera offers an affidavit from its General Counsel, but that affidavit is conclusory and
10 merely recites that the information is confidential, proprietary trade secret and disclosure
11 would place Premera at a competitive disadvantage in hiring and retaining "top talent."
12 However, there is no explanation as to how the use of this information would in practice work
13 to the detriment of Premera. Additionally, the affidavit does not acknowledge the fact that all
14 current compensation is reported and made public annually, and does not attempt to explain
15 why a competitor's knowledge about potential future compensation should be treated
16 differently than knowledge about actual paid compensation. Hence, Premera has offered no
17 evidence that the information about post-conversion potential compensation derives
18 independent economic value from not being generally known. Finally, there is no prohibition
19 by Premera against its employees revealing the details of their compensation packages. It
20 appears that Premera employees, who could actually use the knowledge of their own
21 compensation packages to negotiate better deals somewhere else, are not prohibited from
22 doing so. This lack of protection is inconsistent with Premera's asserted need for
23 confidentiality. In sum, Premera has not satisfied its burden that potential post-conversion
24 compensation information is a trade secret or data that is nondisclosable under the Public
25 Disclosure Act.
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1 Even assuming that Premera has sustained its burden to prove that post-conversion
2 compensation is a trade secret, which I find it has not, such compensation may be disclosed
3 under the Holding Company Act, RCW 48.31C.130, if I determine that disclosure is in the
4 public interest. The statute states in relevant part:

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6 Confidential proprietary and trade secret information provided to the
7 commissioner . . . are exempt from public inspection and copying and shall not
8 be subject to subpoena This information shall not be made public . . .
9 without the prior written consent of the health carrier to which it pertains
10 unless the commissioner, after giving the health carrier that would be affected
11 by the disclosure notice and hearing . . . , determines that the interest of
12 policyholders, subscribers, members, shareholders, or the public will be served
13 by the publication, in which event the commissioner may publish information
14 related to the transactions or filings in the manner and time frame he or she
15 reasonably deems appropriate and sensitive to the interest in preserving
16 confidential proprietary and trade secret information.

11 Under this statute, I must balance the interest in preserving the confidentiality of trade secret
12 information with the public interest that will be served by disclosure. I recognize that the test
13 is not whether the public has an interest in knowing the information, but whether disclosure
14 will serve the interests of the public, policyholders, and others affected by the possible
15 conversion of Premera.

16 In this case, the interest served by disclosure can be compared to the interest articulated
17 under the Public Disclosure Act. The declaration of policy in the Public Disclosure Act states
18 that “full access to information concerning the conduct of government on every level must be
19 assured as a fundamental and necessary precondition to the sound governance of a free
20 society.” RCW 42.17.010(11). The possible conversion of Premera is not a private corporate
21 affair. It is the transformation of a significant nonprofit insurer that holds assets that are
22 intended for the beneficial use of the citizens of this state. It is considered by those affected as
23 a fundamental change in the health insurance business in this state. This transaction is not one
24 that occurs in the boardroom of a private company, but one that is reviewed and analyzed in a
25 public, administrative hearing process. The public’s confidence in these proceedings and the
26 ultimate decision will be based in large measure on whether the facts, assumptions, and

1 hypotheses surrounding Premera's decision to seek conversion are legitimate and animated by
2 an interest in protecting policyholders and not in private gain. It is in the interest of Premera's
3 management, the policyholders, and the public to address fully in the public record any
4 questions regarding potential conflicts of interest in the decision by Premera to apply for a
5 conversion.

6 Premera's post-conversion compensation plans could be reasonable and within
7 industry norms. However, on this issue I do not believe there can be public trust in a decision
8 that would allow conversion, unless the issues and details regarding compensation are made
9 available to the public prior to such decision. Throughout these proceedings considerable
10 effort has been made to protect the legitimate trade secrets of Premera. Thus far, there have
11 been five orders issued by the Special Master and me that have painstakingly reviewed
12 volumes of documents in order to protect Premera's sensitive financial, product, and
13 contracting information. Sensitive information relating to Premera's health plans has been
14 protected in order to avoid harm to Premera's market share and financial operations. However,
15 unlike health plan information, post-conversion compensation raises significant conflict of
16 interest issues. Such issues must be openly heard and discussed for my final decision to have
17 full public credibility.

18 WHEREFORE, IT IS ORDERED this 11th day of February, 2004, that Premera shall
19 file an unredacted electronic version of the Mercer Human Resource Consulting Report by
20 noon on February 18, 2004, and that said report shall be made available to the public by the
21 Office of the Insurance Commissioner at that same date and time.

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MIKE KREIDLER
INSURANCE COMMISSIONER